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NO. 80-5084

IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1980

ELLWOOD L. LEUSCHNER, SR.

Petitioner

v.

STATE OF MARYLAND

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the trial court correctly admit Petitioner's custodial statements into evidence where the record indicates that they were voluntary in the traditional sense, in compliance with the Miranda decision and followed a lawful arrest?

2. Did the trial court correctly impose a life sentence without possibility of parole mandated by Md. Ann. Code, art. 27, § 643 B, where Petitioner's instant sentence is for the fourth separate unrelated period of imprisonment for conviction of a violent crime?

3. Did the trial court correctly permit a State's witness to testify about statements Petitioner volunteered to him because it in no way related to the polygraph examination of Petitioner?

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PRELIMINARY COMMENTS

This brief in opposition to the petition for writ of certiorari is filed pursuant to the request of this Honorable Court, dated September 2, 1980.

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 45 Md. App. 323 (#945, Sept. Term, 1980, April 14, 1980). (Opinion attached as Respondent's Exhibit #1.) Petitioner filed a petition for writ of certiorari with issues identical to this one in the Court of Appeals of Maryland (Pet. Dkt. 176 of 1980), which was denied on July 3, 1980. (Order attached as Respondent's Exhibit #2.)

JURISDICTION OF THE COURT

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS

Petitioner has reproduced Amendments V, VI, and XIV to the Constitution of the United States in his petition for writ of certiorari. (Pet. at 1-2.)

STATEMENT OF FACTS

Respondent accepts the statements of the case and of facts presented by Petitioner. A detailed summary of the evidence at the trial level also appears at pages 8-25 of the slip opinion of the Court of Special Appeals of Maryland, attached as Respondent's Exhibit #1.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI HAS NOT BEEN PRESENTED WITH ACCURACY, BREVITY AND CLEARNESS.

Petitioner has filed a forty-five paged petition for writ of certiorari presenting three issues. Allowing the utmost consideration to Petitioner because he is proceeding in proper person, Respondent nevertheless avers that the petition's length

and rambling style is virtually unmanageable. For example, Petitioner devotes twenty-eight pages of Argument on question I, concerning whether his custodial statements were properly admitted at trial. The arguments include a digression into the alleged incompetency of his trial attorney, which Petitioner acknowledges (Pet. 13-14) was never presented or decided in the State courts and is inapplicable to his case in any event. Thereafter, Petitioner presents a confusing olio of allegations that his statements were the product of an illegal arrest, involuntary and in violation of Miranda. In a preface, he admits these issues turn largely upon the credibility of the witnesses.

This Court's Rule 23(4) declares:

> "The failure of a Petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

II.

THE TRIAL COURT CORRECTLY ADMITTED PETITIONER'S CUSTODIAL STATEMENTS INTO EVIDENCE BECAUSE THE RECORD INDICATES THAT THEY WERE VOLUNTARY IN THE TRADITIONAL SENSE, IN COMPLIANCE WITH THE MIRANDA DECISION, AND FOLLOWED A LAWFUL ARREST.

A. Voluntariness of statements.

Petitioner alleges at length that his decision to describe for the authorities the details of his kidnapping, and strangling to death the nine year old boy, Troy Krause, while performing sodomy upon the child was not voluntary because the conduct of the investigating officers unfairly overcame his will to remain silent.

Petitioner's complaint with the decision of the Court of Special Appeals of Maryland focuses upon its

> ". . . erroneous and blind acceptance of testimony from the witnesses, who, by their own words as recorded in the records, contradict, and present false statements from which the lower court derived their findings . . ." (Pet. at 13.)

The Court of Special Appeals of Maryland analyzed the voluminous record of the motion to suppress the statements of Petitioner where the trial court concluded that the testimony of the officers provided the credible version of events:

> "Quite frankly the court finds that the defendant's representations as to what happened, that is, with every breath he was asking for a lawyer is incredible and for it to be believed this court must believe that all those people who participated in the interrogation of this defendant were somehow mutually involved in some sort of conspiracy to violate his rights, which the court does not believe in this case." (T. 360).

Review of the opinion of the Court of Special Appeals of Maryland reveals strict and conscientious reliance upon the decisions of this Court on the voluntariness of confessions. Petitioner presents no novel issue, one left open or omitted by this Court. Therefore, it would not be useful or of national importance for this court to expend its resources reviewing a matter already reviewed by all levels of the Maryland judiciary.

B. Compliance with the Miranda decision.

Petitioner also argues that his confession to the crimes against young Troy Krause were received by the police without an adequate waiver of the rights listed in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). Again, this raises no more than a factual question, definitively put to rest by consulting the record of the suppression hearing.

The officers testified that Petitioner was given and waived the full text of the Miranda warnings prior to every occasion of questioning. Petitioner testified that he doggedly begged not to be questioned without a lawyer present. The trial judge, obviously in the superior position to weigh the credibility of the witnesses appearing before him, chose to credit the officer's evidence and to disbelieve Petitioner's. Petitioner's understandable unhappiness at not being believed may explain his continuing to protest his conviction but it adds no compelling

ground for re-reviewing the credibility question and the sufficiency of evidence question of the trial court proceedings.

The Court of Special Appeals of Maryland analyzed the facts surrounding the Miranda waiver and making of the statements according to the precepts announced by this Court in North Carolina v. Butler, ___ U.S. ___, 60 L.Ed.2d 286, 292 (1979). While Respondent does not dispute that there was a valid waiver by Petitioner's conduct, as in the Butler case, there additionally was ample support in the record for finding a written waiver of rights. The conduct about which Petitioner complains deals with events one, two and three days prior to the confession to the Troy Krause abduction, sodomy and murder.

On the day Petitioner confessed to the Krause killing, he executed a written Miranda waiver and confessed to the similar killing of another youth, Rusty Marine. See Leuschner v. State, 41 Md. App. 423, 397 A.2d 622 (1979), cert. denied, 285 Md. 731 (1979), cert. denied, ___ U.S. ___ (Oct. 29, 1979). The Marine confession, which was typed personally by Petitioner because he felt he could do it faster than the police, preceeded immediately Petitioner's admission to Ms. Larmore, his girlfriend, of the Krause killing and ensuing questions about it by the police.

Thus because the record supports that there was both a tacit and an express waiver of the Miranda rights preceding any police questioning and the challenged confessions, Petitioner has not presented an issue which calls for more than adjudging the sufficiency of evidence. As such, his petition is not worthy of review on a writ of certiorari.

C. Legality of arrest.

Petitioner concedes that his attack upon both the legality of his arrest as a California parole violator and the constitutionality of the State statute under which the arrest was made were not preserved for appellate review by timely objection, mandatory under State rules of criminal procedure. Md. Rules

736; 1085. (Pet. at 14). This Court has recognized the need for a State to regulate the means by which issues are developed in the trial court and preserved for later review:

> ". . . [T]hus the failure to timely object to its admission amouonted to an independent ground which would have prevented direct review here. See Henry v. Mississippi, 379 U.S. 633, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965)."

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977).

Even on the merits of Petitioner's contention, there is no basis for granting the certiorari petition. Petitioner primarily relies on the recent case of Payton v. New York (Nos. 78-5420 and 78-5421) ___ U.S. ___, 100 S.Ct. 1371 (1980), to prove his warrantless arrest by Maryland police officers as a fugitive from a California parole violation charge was illegal. The Payton case (and its companion, Riddick v. New York, reported as one decision) is inapposite.

In the instant case, the police did not use force to enter Petitioner's housetrailer and to make the arrest. When the officers announced their presence and purpose at the trailer door, Petitioner and his girlfriend consented to their entry and Petitioner accompanied the officers to the station for booking. He was anxious to have the parole matter "cleared up." (T. 28-32). In Payton, the gravamen of the complaint against the officers was their warrantless forcible entry. Id., ___ U.S. at ___, 100 S.Ct. at 1375.

The instant situation is factually dissimilar to Payton for another reason. Here, local police before the arrest had verified the pending California parole violation charge and the willingness of the California authorities to extradite Petitioner. Their conduct was in accord with Maryland statutes, to which no consttutional attack was made at trial. See Md. Ann. Code, art. 27, SS 28A, reproduced at (Pet. 3). Within hours of his arrival at the police station, Petitioner was taken before a

magistrate for presentment on the fugitive charge (T. 131-38).

In summary, none of the three bases relied upon by Petitioner for securing review of his confessions on a writ of certiorari presents a novel or undecided issue of law, or one of national impact or interest. Rather, his contentions are distilled mainly to a question of sufficiency of evidence and credibility of witnesses.

III.

THE ADMISSION INTO EVIDENCE OF THE SEVERAL STATEMENTS PETITIONER GAVE TO LAW ENFORCEMENT OFFICERS, EVEN IF ERROR, WAS HARMLESS BEYOND A REASONABLE DOUBT, BECAUSE THE SAME ADMISSIONS WERE RECEIVED INTO EVIDENCE THROUGH THE STATEMENTS PETITIONER MADE TO A PRIVATE CITIZEN, BETTY JEAN LARMORE, HIS GIRLFRIEND.

Even assuming, arguendo, that the admissions which Petitioner made to law enforcement officers should have been suppressed that error would be harmless beyond a reasonable doubt. There was evidence at trial from his girlfriend, Betty Jean Larmore, that Petitioner admitted killing young Troy Krause and burying the corpse on the Zimmerman farm (T. 49-51, 55). These statements were not the product of custodial interrogation by law enforcement personnel. Therefore, they were not subject to suppression for alleged violations of Petitioner's federal constitutional rights, regardless of the ruling with respect to the conduct of police officers. Only statements involving government agents fall within the ambit of the Fifth and Sixth Amendments. Statements to private citizens, even to those who later become witnesses for the prosecution, are not subject to the exclusionary rule of the federal Constitution. See, e.g., Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408 (1966); Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424 (1966).

Under Maryland procedure, where the same or similar evidence is properly introduced through one witness, any error in its introduction through an improper witness becomes harmless. Peisner v. State, 236 Md. 137, 144 (1964), cert. denied, 379 U.S.

1001 (1965). Thus Wainwright v. Sykes, 97 S.Ct. at 2506, prevents direct review at the Supreme Court level.

Accordingly, the confession questions Petitioner attempts to raise, even if they relate to constitutional protections, are not worthy of review by writ of certiorari because even were Petitioner to prevail, the errors would be deemed harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824-827, 17 L.Ed.2d 705 (1967); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

The harmless error consideration is particularly compelling in the instant case, where the defense at trial was narrowed to the question of Petitioner's insanity, not the inadequacy of proof of the corpus delicti, or his criminal agency. Petitioner made no argument to the jury that his challenged confessions to the police officers were involuntary. The content of those confessions, indicating the savagery and brutality of the acts committed upon the nine year old victim, Troy Krause, were helpful in Petitioner's approach to the jury that no sane man could have acted as he did at the time the offenses were committed. (T. 319-35).

IV.

THE TRIAL COURT CORRECTLY IMPOSED A LIFE SENTENCE WITHOUT POSSIBILITY OF PAROLE MANDATED BY MD. ANN. CODE, ART. 27, § 643B, WHERE PETITIONER'S INSTANT SENTENCE IS FOR THE FOURTH SEPARATE UNRELATED PERIOD OF IMPRISONMENT FOR CONVICTION OF A VIOLENT CRIME.

Petitioner next argues that his sentence of life imprisonment without parole was not imposed in conformity with Md. Ann. Code, art. 27, § 643B (reproduced at Pet. 2-3). Before sentencing it was agreed that Petitioner had been imprisoned for a California rape conviction in 1953, a California rape conviction in 1965 (the offense which formed the basis for his fugitive status as a parole violator), and a Maryland conviction for first degree murder in 1978 (the prior, unrelated killing of Rusty Marine).

The instant sentence was imposed well after Petitioner had commenced serving the term for the Marine murder and was consecutive to that term. Thus, under the terms of the Maryland statute, Petitioner shall have served three prior, separate periods of incarceration for convictions of violent crimes at the time he embarks upon the instant sentence. This court's decision in Spencer v. Texas, 385 U.S. 554, 566, 87 S.Ct. 648, 655, 17 L.Ed.2d 606 (1967), has upheld a State's prerogative of enacting statutes to punish violent recidivists such as Petitioner. See, also, Rummel v. Estelle, ___ U.S. ___, 100 S.Ct. 1133, 1139 (1980), where the Texas statute mandating life imprisonment upon the fourth felony conviction was upheld even where those "felonies" involved relatively minor, and non-violent property crimes. The argument presented in the "amendment" to the Petition, based upon case of Calhoun v. Maryland, ___ Md. App. ___ (Sept. 9, 1980), is equally unavailing. The error of the lower court in Calhoun was in imposing four consecutive sentences without parole, instead of one, as permitted by art. 27, § 643B. The statute limited the term in Calhoun's case to 25 years; yet by adding consecutive sentences, to the one proper sentence, a total of 50 years was incorrectly accumulated for related convictions arising from the same criminal transaction.

V.

THE TRIAL JUDGE CORRECTLY ADMITTED THE TESTIMONY OF A STATE'S WITNESS ABOUT PETITIONER'S STATEMENTS TO HIM, BECAUSE IT IN NO WAY RELATED TO A POLYGRAPH EXAMINATION.

Petitioner's final question is unworthy of review on a writ of certiorari because it is unsupported by the trial record. As that record indicates, the testimony of Sgt. Griffith, the State Police polygraph examiner, in no way related to the polygraph examination, which Petitioner had requested in order to aid him in recalling where he had buried Troy Krause (T. 73-79). Since the scope of the examination in no way involved the polygraph examination, there is no factual basis to support the allegation

that the case of Akonom v. State, 40 Md. App. 676 (1978), is involved.

Petitioner apparently misapprehends the gist of the Akonom rule. Whereas the results of polygraph examinations (i.e., that the accused stated X, Y and Z, which the polygraph instrument registered as either truthful or false), are not considered reliable enough to be admissible in Maryland courts, the conversations a person has with the officer who happens also to be a polygraph interpreter are as admissible as any other voluntary statement to a law officer. The evidence here related to this latter case, where the examination results were not involved.

This evidence, even if erroneously admitted, would have been harmless beyond a reasonable doubt for the reasons and upon the legal authorities presented hereinabove.

CONCLUSION

For the reasons stated, Respondent respectfully requests tht this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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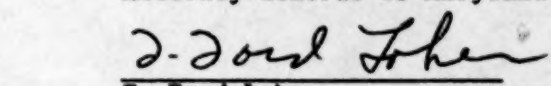

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